No. 21,909

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SONORA SUNDRY SALES, INC.,
d/b/a VALUE GIANT,
Respondent.

BRIEF FOR THE RESPONDENT

LITTLER, MENDELSON & FASTIFF,
593 Market Street,
San Francisco, California 94105,
Attorneys for Respondent.

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JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board for enforcement of its Decision and Order issued against Respondent Sonora Sundry Sales, Inc., d/b/a Value Giant, on November 1, 1966. The Board's Decision and Order are reported at 161 NLRB No. 53. In its Answer, Respondent has denied the commission of any unfair labor practices, and has requested that the Court deny enforcement of the Board's Order. The Court has jurisdiction of this proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151,

et seq.), the events in this case having occurred in Sonora, California, within this judicial district.

COUNTERSTATEMENT OF THE CASE

A. Questions Presented to the Court.

This is a proceeding in which the Board seeks to compel an employer to engage in collective bargaining with a labor union in the absence of an election and through the mechanism of a check of membership applications executed by the employees in question. The issues raised by Respondent are the following:

(1) It is Respondent's position that the Union membership applications were tainted or invalidated by a material misrepresentation of the Union organizer in obtaining them from the employees. The misrepresentation was that every employee was told that the membership application cards would be kept secret in the Union's files and would never be shown to the Employer. By reason of such misrepresentation, the membership applications cannot be used as a basis for compelling the Employer to engage in collective bargaining with the Union through means of a card check by the Employer, or as a basis for finding the Employer in violation of Sections 8(a)(5) and (1) of the Act for failing to so bargain.

(2) It is Respondent's further position that it was justified in not bargaining with the Union by reason of a good faith doubt as to whether the Union represented a majority of its employees and whether the membership application cards represented the true

views of its employees. This doubt was created by a written secret ballot taken virtually concurrently[1] with the Union's demand for recognition in which eleven out of twelve of the employees in the unit (the twelfth ballot being unmarked) told the Employer that they wished the question of union representation determined by a secret ballot election held by the National Labor Relations Board and not by a card check or examination of union membership applications by the Employer. This doubt was reenforced five days later when a majority of the employees in the unit signed a letter to the Union, requesting the return of their membership applications and demanding a secret ballot election on the question of union representation. A copy of this letter was sent to the Company by the employees.

(3) A further question presented for the Court is whether a speech to the employees by Robinson, a retail supervisor of the Employer's parent company, on June 12, 1965 threatened a reduction in wages if the employees were under a union contract, and thereby violated Section 8(a)(1) of the Act. Respondent contends that on the facts shown in this record (and as found by the Trial Examiner and the Board) no such threat of a reduction in wages was made or implied by Robinson. His remarks were pro-

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[1]The Union request for recognition was made in a meeting between the Employer's store manager and the union organizers on the afternoon of June 9, 1965. The ballots were distributed to the employees by the Employer on the morning of June 9, and were returned by the employees to the store manager over the two-day period June 9 and June 10, 1965.

tected as free speech under Section 8(c) of the Act, and there was no violation of Section 8(a)(1).

B. Supplemental Factual Statement.

Respondent does not desire to controvert the statement of facts presented by the Board in its opening brief. However, in view of the issues presented by Respondent to the Trial Examiner, the Board and this Court, there are some factual omissions in the statement which should be supplied.

(1) Store Opening.

The Employer's operation in this proceeding is a small variety or discount-type store in Sonora, California. At the time the events occurred in 1965, the Employer's parent company also operated similar type stores in Woodland, Watsonville, Livermore and Seaside, California, and Reno and Las Vegas, Nevada. (TR 396-397) It further operated ten concessions in various discount department stores throughout Northern California. (TR 148-150) The Sonora establishment was a new enterprise of the Employer, commencing operations May 27, 1965. From April 20, 1965 it was being remodeled, old merchandise was remarked, new merchandise was received and departments were set up. (TR 178-179) Finch was its manager since April 20, 1965. It was the first time he had ever been manager of a store in actual operation. He had previously worked as a clerk, assistant manager, and as a manager of a concession for the purpose of shutting it down. (TR 178, 186-193, 255-258) He had never had any experience with a store being organ-

ized before, although he was a member of the Union involved in this proceeding, at present on a withdrawal card. (TR 263, 280)

Thus, when the Union came into the picture on June 5, 1965 the store had been open less than a week, a new manager was in charge without prior experience in dealing with the Union during an organizational campaign, and the normal upset of a new store was in full force and effect.

(2) Union Organizational Efforts.

The record in this case would indicate that union organizational efforts commenced on June 3, 1965. Turner and Mierly were the union organizers. Turner testified that the first employees signed up were Richard Cieri, Jayne Casler and one unidentified male employee whose card was not used by the Union since he terminated before the demand for recognition was made. (TR 52-53) The cards of Cieri and Casler are dated June 3, 1965 and it is thus we establish the date. (G.C. Exs. 10 and 17) An examination of all the cards in evidence (G.C. Exs. 8 to 18) would indicate that two cards were signed on June 3, five on June 7 and four on June 8.

Turner testified that he did not recall exactly what he told the employees when signing them up. He usually told employees, however, that they could have an election by the National Labor Relations Board or a cross-check of the cards by an impartial third party. (TR 53-57) He did not mention seeking the check of the cards directly by the Employer, without

a third party. (TR 57) *He told all the employees substantially the same thing when signing them up and told none of them anything materially different from the others.* (TR 61)

Every single employee still with the store at the time of the hearing before the Trial Examiner testified, three as witnesses for the General Counsel and three called by Respondent. They all testified that when asked to sign cards, Turner told them *that their cards would be kept secret by the Union and would never be shown to the Employer.* Not one employee testified differently. (TR 82, 83, 102, 147, 335, 340, 350, 354) The six employees who so testified constituted a majority of the employees in the unit who signed union membership applications.[2]

Although they both testified, neither Turner nor Mierly denied that they told the employees that the membership applications would be kept secret by the Union and would never be shown to the Employer. Furthermore, the Board's brief fails to claim that the misrepresentations were not made. It merely argues that the misrepresentations had no legal significance

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[2]Between June 3 and June 8, 1965, the Union had obtained membership applications from eight out of the twelve store employees. (TR 9-10, 15-17, G. C. Exs. 8-18) The Union had originally obtained eleven authorization cards but three of these (G. C. Exs. 9, 12 and 16) were signed by employees who were no longer in the unit or in the employ of the Company on June 9, 1965, the date on which recognition was requested. (TR 10-11) See Appendix "A" for a tabulation of employees in unit who signed cards, employees no longer in unit who signed cards, employees who signed letter requesting return of cards, and employees who testified at hearing.

with respect to validity of the membership applications. (Board's brief, pages 13-15)

The statement of the union organizers to each employee that the membership applications would be kept secret and never shown to the Employer turned out to be a gross misrepresentation because on June 9, 1965, the next day after the last cards were signed, the cards were shown to the store manager as part of the recognition demand.

There is a subsidiary representation (or possible misrepresentation) by the union organizers which plays some part in this case. It is clear from the record that at the time that the employees were signed up, the union organizers discussed a "drug" collective bargaining agreement, even though the Sonora store was a variety or discount type establishment. (Resp. Ex. 3) According to Turner, he told the employees he would *attempt* to get the "drug" agreement for them from the Employer. (TR 58-59) However, a number of witnesses, two of them (Cieri and Huckaby) produced by the General Counsel, testified that Turner told them he *would* get the "drug" agreement for them and that they would be working under it after the Union got in. (TR 79, 82, 89, 138) Respondent does not suggest that the statements of Turner concerning the drug agreement constituted improper or illegal organizational technique. However, the use of the drug agreement in the Union's organizing drive explains why the employees were disenchanted and asked for their cards back after they discovered from Robinson's talk on June 12 that

at page 5, lines 12 to 15 of his Decision (R 5) that Finch questioned whether he *could* or should sign the document handed him. This finding likewise was not overturned by the Board.

We suggest that there is substantial evidence in the record to support the unreversed factual finding of the Trial Examiner that the union organizers were told by Kessler that Finch did not have any authority to sign any documents on behalf of the Company, including a recognition agreement. The resolution by the

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264) Turner testified that Finch did not tell him he lacked authority to sign a recognition agreement, but only told him he lacked authority to sign a collective bargaining contract. (TR 34, 37-38, 40, 45-46) The same conflict appears with respect to Turner's telephone conversation with Kessler, the Company's attorney. Kessler testified that he told Turner over the telephone that Finch did not have authority to sign anything and that all papers should be sent to the Company's headquarters in San Francisco. (TR 116-117, 122, 123, 125, 129, 134) Turner admitted he discussed Finch's lack of authority with the attorney, but again made the distinction between Finch's authority to sign a recognition agreement and lack of authority to sign a collective bargaining agreement, and stated that the attorney only discussed the latter. (TR 21-22, 49-51, 62) This conflict of testimony was resolved by the Trial Examiner in favor of the Employer's witnesses and finding that they told Turner that Finch did not have authority to sign any documents. The Board did not reverse or overturn the Trial Examiner's Findings of Fact in resolving these conflicts between the witnesses. It merely stated the Union's position on this conflict and asserted that this was Respondent's position, a clearly incorrect determination.

As a legal conclusion the Board found (R 41) that Finch had ostensible authority to acknowledge the Union's majority showing on behalf of the Employer, but this conclusion is patently incorrect in view of the Trial Examiner's unreversed factual finding that both Finch and Kessler told Turner on June 9 that Finch did not have authority to sign anything, and Kessler told him that Finch did not have authority to recognize the Union. Such matters had to be handled by the Company officials in San Francisco. Individual "A" cannot appear to individual "B" to have ostensible authority to perform an act on behalf of his employer when "B" has been told both by "A" and the attorney for "A" 's employer that "A" has no such authority in fact.

Trial Examiner of the conflicting testimony in this respect, while adverse to the General Counsel, is equally as binding on the General Counsel as is the Trial Examiner's resolution of the conflicting testimony on the sequence of events of the June 9 meeting, which was adverse to Respondent. None of these factual findings were reversed by the Board.

SUMMARY OF RESPONDENT'S ARGUMENT

(1) The Alleged Violation of Section 8(a)(1) of the Act.

On June 12, 1965, retail supervisor Robinson of the Employer's parent company, made a speech to the employees at the Sonora store. There were minor conflicts of testimony concerning the statements made in his talk. The Trial Examiner made factual findings concerning Robinson's speech, holding in general that it compared Respondent's wages and working conditions with those pertaining under the Union's discount store agreement. He found no illegal threats or promises and held that Respondent had not violated Section 8(a)(1) of the Act by reason of Robinson's talk. The Board in its Decision did not reverse or overturn the Trial Examiner's factual findings with respect to Robinson's talk. Instead, it summarized in shorter form the substance of Robinson's talk (its summary not differing in substance materially from that of the Trial Examiner). However, the Board concluded that Robinson's speech contained a threat that execution of a union contract would result in decreased wage rates for the employees and that this alleged

threat violated Section 8(a)(1) of the Act. The determination of the Board was erroneous for the following reasons:

(a) Robinson's talk to the employees on June 12, 1965 contained no threats or promises, and was protected as free speech by reason of Section 8(c) of the National Labor Relations Act. The recent decision of this Court in *NLRB v. TRW-Semiconductors, Inc.*, ... F. 2d ....., 66 LRRM 2707 (November 24, 1967) supports Respondent's position in this respect.

(b) In neither the Trial Examiner's factual summary nor the Board's factual summary of Robinson's speech is there any finding of fact or implication that Robinson told the employees that their wage rates would be decreased if a union contract was executed. Their summary of Robinson's speech, as well as the testimony at the hearing, makes it clear that Robinson was comparing the Employer's existing wages and working conditions with those prevailing under the Union's discount store agreement. This is not unlawful propaganda during a union's organizational campaign. The Board's finding that Section 8(a)(1) of the Act was violated by Robinson's speech is not supported by substantial evidence in the record.

(c) The Board's finding that Robinson threatened that execution of a Union contract would result in decreased wage rates is at variance with the complaint against Respondent. There is no such allegation in the complaint. The complaint alleges in paragraph VI thereof (R 6) that on or about June 9, 1965 Robinson informed employees that they would not receive a

projected wage increase if they selected the Union to represent them in collective bargaining. There was no testimony presented at the hearing in support of this allegation of the complaint. Robinson did not talk to the employees on June 9, 1965. His only appearance was on June 12, 1965. Furthermore, no witness testified that Robinson told employees they would not receive a projected wage increase if they selected the Union to represent them in collective bargaining. Neither the Trial Examiner nor the Board in their factual findings suggests that Robinson made any such statement. What the Board concluded, contrary to the Trial Examiner, and contrary to the testimony, is that Robinson's speech contained a threat that execution of a Union contract would result in decreased wage rates, but no allegation of any such threat was contained in the complaint. In other words, the complaint alleged one type of threat concerning which there was no testimony, proof or finding by the Board, and the finding of the Board concerned a type of threat concerning which there was no allegation in the complaint nor any proof in the record or in the factual findings.

(2) The Alleged Violation of Section 8(a)(5) of the Act.

Contrary to the Trial Examiner, the Board found that Respondent violated Section 8(a)(5) of the Act and illegally refused to engage in collective bargaining with the Union following the store manager's examination of the union membership applications on the afternoon of June 9, 1965. This determination is erroneous for the following reasons:

(a) Even though a majority of the employees in the appropriate unit executed membership applications in the Union, these applications were tainted or invalid because they were obtained through misrepresentation by the union organizers. By reason of the misrepresentations the membership applications do not constitute a clear demonstration that a majority of the employees desired the Union and such tainted applications cannot support a conclusion that the Employer illegally refused to bargain with the Union. The misrepresentation consisted of the union organizers talking to the employees in terms of having a National Labor Relations Board secret ballot election or a card check by a neutral third party *and promising the employees that their cards would be kept in the union files and would never be shown to the Employer.* In view of such a promise made to all the employees who signed the membership applications, the Union cannot turn around the following day and claim representation rights by reason of showing the cards to the Employer's store manager.

As a factual matter, this type of misrepresentation should invalidate the membership applications as the basis of a refusal to bargain finding since we cannot hypothesize whether or not the employees would have signed the applications in the absence of such a representation.

As a legal matter, in a case involving a similar type of misrepresentation, the United States Court of Appeals for the Eighth Circuit has held that the NLRB was not warranted in finding that the employer vio-

lated Section 8(a)(5) of the Act by refusing to bargain collectively with a union which relied on authorization cards obtained through such misrepresentations. *(Bauer Welding & Metal Fabricators, Inc. v. NLRB* [8th Cir. 1966] 358 F.2d 766, 62 LRRM 2022)

(b) The union organizers requested recognition of Finch, the store manager, on the afternoon of June 9, 1965. In a secret ballot issued to the employees that morning, returned by them to the Employer on June 9 and June 10, the following day, they voted that they preferred the question of union recognition to be determined by a secret ballot election rather than by a check of the union membership applications by the Employer. This vote was by eleven out of twelve of the employees in the unit, the twelfth employee leaving the ballot blank. The ballots were in written form, but they were secret and the employees were instructed not to sign their names. These ballots created a doubt in the Employer's mind as to whether the membership applications reflected the true feelings of the employees concerning the Union. If the employees truly desired a union, why were they insistent on a secret ballot election rather than a determination of that question by an examination of their membership applications? In the face of the ballots, the Employer was justified in not recognizing the Union until the representation question was determined by a secret ballot election. Otherwise the Employer would be flouting the expressed desire of the employees.

Furthermore, within five days after the Union's request for recognition a majority of the employees in

the unit signed a letter to the Union requesting return of their membership application cards and demanding a secret ballot election on the question of representation. They sent a copy of this letter not only to the Union but also to the Employer. This further solidified the doubt of the Employer as to whether the Union truly represented its employees and whether the membership applications were an accurate reflection of the employees' real desires concerning union representation.

(c) Even though in his meeting with the union organizers on the afternoon of June 9, 1965 Finch, the store manager, signed two documents, one a brief agreement recognizing the Union and the other an even briefer agreement acknowledging that the Union represented a majority of the employees, neither of these documents should be considered legally significant. The store was in its first week of operation and Finch was a new store manager with no prior experience as a store manager and no prior experience in dealing with a union organizational campaign. As the Trial Examiner found (and his findings were not reversed by the Board), Kessler the Employer's attorney, told the union organizer in a telephone conversation during the meeting that Finch had no authority to sign any documents on behalf of the Company or to recognize the Union, and that these documents should be sent to San Francisco. Whatever the scope of Finch's authority might have been under other circumstances, here the Union was put on notice during the meeting that Finch did not in fact have authority to sign a recognition agreement.

ARGUMENT

I

THE BOARD ERRONEOUSLY FOUND THAT ROBINSON'S SPEECH VIOLATED SECTION 8(a)(1) OF THE ACT.

A. The Complaint Lacks Any Allegation Concerning the Alleged Violation.

The complaint alleges in paragraph VI that on or about June 9, 1965 Robinson informed the employees at Sonora that they would not receive a projected wage increase if they selected the Union to represent them in collective bargaining. (R 6) No testimony was offered at the hearing to sustain this allegation of the complaint. Furthermore, neither the Trial Examiner nor the Board made any findings of fact or law that Robinson had engaged in such activity. As indicated above, Robinson was not at Sonora on June 9, but rather made his talk to the employees on June 12. His talk did not contain any such statement, and furthermore the record fails to disclose any such projected wage increase. The allegation of the complaint is completely unfounded and neither the Trial Examiner nor the Board has suggested that there was any merit to it.

The Trial Examiner, of course, found no violation with respect to Robinson's speech to the employees on June 12. The Board, however, concluded that Robinson's speech contained a threat that execution of a union contract would result in decreased wage rates for the employees and that this threat violated Section 8(a)(1) of the Act. (R 42) Aside from the substantive issue of whether Robinson's speech contained such a threat, we suggest that the Board cannot find

a violation of the Act with respect to a matter never alleged in the complaint. The complaint is not only completely silent upon the subject matter of this alleged violation, but there was no attempt to amend the complaint to conform to the proof. Section 102.17 of the Board's Rules and Regulations provides as follows:

> "SEC. 102.17 *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board."

Thus, the complaint could have been amended prior to the hearing by the regional director who issued the complaint, at the hearing upon motion to the trial examiner, and after the hearing upon motion to the Board. Yet no request was made to amend. Under these circumstances the Board's determination finding a violation of Section 8(a)(1) should not be sustained when the matter has never been alleged. This is more than a matter of elementary fairness. The courts and the Board have ruled that matters unalleged in a complaint may not be held to constitute an independent violation of the Act. *The Columbus Showcase Company,* 111 NLRB 206 (1955); *I.F. Sales Company,* 82 NLRB 137, 138 (Footnote 6) (1949); *NLRB v.*

H.E. Fletcher Co. (1st Cir. 1962) 298 F.2d 594; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F.2d 482.

In *Fletcher,* the Court said:

> "We believe it would derogate elemental concepts of procedural due process to grant enforcement to such a finding. As was stated in Douds v. International Longshoremen's Ass'n, 241 F.2d 278, 283 (2 Cir 1957): 'The Complaint, much like a pleading before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.' Where the Board improperly makes its finding on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement, see, National Labor Rel. Bd. v. Bardley Washfountain Co., 192 F.2d 144 (7 Cir 1951)". (298 F.2d 594, 600)

Thus, aside from the merits of the issue, the finding of the Board that Respondent violated Section 8(a)(1) of the Act should be set aside on the ground that the matter has never been properly pleaded or alleged pursuant to the rules and regulations of the Board.[4]

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[4]The Board points out in Footnote 3 to its decision that the complaint did not allege violations of the Act based upon a speech by Finch on June 7, 1965, the poll taken by Respondent concerning the employees' desires for an election or a card check on June 9, 1965, or a wage increase which Respondent granted in all its stores, including the Sonora store, on July 17, 1965. The Board said that although these matters were brought up at the hearing, they were not litigated sufficiently fully to warrant

B. The Board's Conclusion That Robinson, on June 9 Threatened Employees That Execution of a Union Contract Would Result in Decreased Wage Rates Was Erroneous As a Matter of Fact and As a Matter of Law.

It is clear from the record that Robinson, a retail supervisor of Ames Mercantile Company, the Employer's parent company, spoke to the Sonora employees about the Union at a meeting on June 12, 1965. Robinson was scheduled to be at the Sonora store on that day and the Company's president asked him to speak to the employees about the Union. The background for his speech was that the Union had asked for recognition on June 9 and further, in its organizational campaign, the Union had discussed with the employees a "drug" collective bargaining agreement. (Resp. Ex. 3) There was conflict between the union organizer Turner and the employees over what was said concerning the "drug" agreement. According to Turner, he told the employees he would attempt to get the "drug" agreement for them from the Employer. (TR 58-59) However, a number of employee witnesses testified that Turner told them he *would* get

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basing any findings of violations of the Act thereon. (R 42) We suggest that the Board's finding that Robinson threatened employees that the execution of a union contract would result in decreased wage rates stands on no better basis. There is no reason to distinguish it from the other matters which were not alleged in the complaint nor fully litigated. For example, in the Trial Examiner's conclusions (R. 21) he refers specifically to Robinson's speech and finds no evidence that the employees were told that they would not receive a projected wage increase if they selected the Union to represent them. This is the issue which the complaint alleged in paragraph VI, concerning which there was no evidence. On the other hand, the Trial Examiner does not mention one way or the other any allegation that Robinson had threatened employees with a wage reduction if they were under a union contract. This conclusion appears for the first time in the Board's decision.

the "drug" agreement for them and that they would be working under it after the Union got in. (TR 79, 82, 89, 138) The Employer had referred previously to the Union's organizational tactics concerning the drug agreement in a memorandum dated June 9, 1965 which was handed to all employees with the ballots on June 9, 1965. (Resp. Ex. 6) In this memorandum the Company's president pointed out that the contract which the employees had been handed by the union representative during the organizational campaign, and the wage rates contained within it, did not apply to the Company's type of retail operation. Rather, that contract covered the drug industry, which included a prescription pharmacy, and the Employer did not now have nor intend in the future to have a prescription pharmacy on the premises.

With this background in mind, Robinson spoke to the employees on the morning of June 12, 1965. He and Finch, the store manager, as well as employees Huckaby, Modrell and Cieri, testified concerning the meeting.[5] Most of this testimony was in accord although there was some mild conflict. With respect to this testimony the Trial Examiner made the following factual findings:

> "On Saturday, June 12, 1965, Russell Robinson, retail supervisor for Ames Mercantile Company, spoke to the employees of Respondent at 8:00 A.M. They had been told the day before by store manager Finch to report to the store an hour early for this meeting. Robinson was intro-

[5]Cieri testified that he did not remember anything particularly about the June 12 meeting. (TR 88-89)

duced by Finch, who told the employees that Robinson was there to acquaint them with the union situation from the Company's point of view, and that he was in no way advising them whether or not they should join the Union. Robinson stated that he understood they had all signed union cards, and that it was entirely up to the employees if they wanted a union or not; that he could not tell them to join the Union or not, and that there would be no reprisals of any kind if they did, but that he did feel they had been shown the wrong contract by the union representative; that he did not think Ames Company would sign a 'drug contract' because Respondent did not have a prescription counter and never would have one; that the other Ames stores that did have a union were under a discount or variety store contract. He stated that the beginning wage, under the discount store agreement, was $1.35 per hour whereas they were currently receiving $1.40 an hour. One employee asked whether they could get their cards back from the Union, and he replied that they could contact the Union and ask for the cards if they wanted to, but any action they took would be completely on their own. He told them that whether they realized it or not, they had given the Union the right to picket the store by signing the cards. An employee asked about the $1.50 wage rate he thought they were to get when the store opened, and Robinson said that that was a misunderstanding, and that he wanted to get the matter straight as to the wage policy; that the employees of Value Giant Stores start at $1.40 per hour, get a pay increase to $1.50 after a period of 65 days and an increase to $1.70 after one year; that if they joined the Union in

> the meantime, then, under the discount store contract, it would take them longer to build up to the top pay than it would under Respondent's pay increase program. He also informed them of the Company's program or policy on health and welfare, sick pay and holidays."
>
> (R 17-18)

From these factual findings concerning the June 12 meeting, the Trial Examiner reached the following conclusions:

> "Respondent attempted to convince the employees that the 'drug agreement' would not be an appropriate agreement form for the Sonora store, and Respondent balloted employees on the issue of representation by secret election or by card check. Respondent represented to employees that a discount store agreement would be the type that the Sonora store would fall under, and that wage rates would be better and top pay reached more quickly under Respondent's pay program than under the discount store agreement. I find that Respondent's representations come within the scope of Section 8(c) of the Act, and that the balloting was objectively conducted, and under the circumstances of this case, not an unfair labor practice. I find no evidence that employees were told that they would not receive a projected wage increase if they selected the Union to represent them."
>
> (R 21)

From the factual dissertation of the Trial Examiner concerning Robinson's speech on June 12 it will be seen quite clearly that he in no way suggested that

the employees would get a wage decrease if the union contract were signed, specifically if the discount store contract were signed. All he did was legitimately point out that under Respondent's existing pay program the employees went from a starting rate of $1.40 per hour to the top rate of $1.70 per hour after one year and that if they joined the Union in the meantime, then under the discount store contract it took longer to build up to the top pay than it would under Respondent's wage program. This is perfectly permissible propaganda, protected as free speech under Section 8(c) of the Act. He was merely comparing the Employer's existing program with that which prevailed under the Union's discount store agreement. This does not imply a wage deduction, much less expressly threaten one. It merely points out that the Respondent's existing program is better than the union contract.

The factual findings of the Trial Examiner concerning the June 12 meeting were not overturned or reversed by the Board. Instead, the Board made its own factual finding which in briefer form covered the exact same subject matter as the Trial Examiner's factual findings. The Board's factual findings concerning the June 12 meeting are as follows:

> "On June 12, Robinson, a representative of Ames Mercantile Company, Inc., of which the Respondent is a subsidiary, in an address to the employees here involved, stated that he understood they had all signed cards; that he did not think Ames would sign a 'drug contract' because the Respondent did not have a prescription coun-

> ter, and other Ames stores had a 'variety store contract'; that the beginning wage under the latter contract was $1.35 an hour whereas the employees were currently receiving $1.40; and that, if they joined the Union, it would take them longer to build up to top pay than it would without a union. Robinson also referred to the various benefits available to the employees."
>
> (R 40)

It will be seen from an analysis of the factual findings that the Board itself does not state or imply that Robinson threatened employees with a reduction in wages if they were under the union agreement. He merely compared the Employer's existing wage schedule with the schedule in the union agreement. The Employer's existing schedule had a $1.40 starting wage where the Union's variety store contract or discount store contract had a $1.35 starting rate. Also, it took longer to build up to top pay under the Union's variety store agreement than it did under the Company's wage schedule without a union. Again, this type of comparison is perfectly legitimate propaganda during a union's organization campaign. The employer can point out to the employees that he has a better wage schedule than the union has in its contract. If an employer cannot do this, Section 8(c) has little meaning.

From the above factual finding, the Board concluded that Robinson threatened that execution of a union contract would result in decreased wage rates. This is not a fair import of his remarks, whether we take the Trial Examiner's detailed factual findings or

the Board's briefer and more general factual findings. The Board is straining to extract a threat out of Robinson's proper remarks.

Let us put ourselves in Robinson's shoes. Here he was addressing a group of employees and he knew that the Company's own wage schedule was superior to the wage schedule in the appropriate union agreement. How else could he express this thought to the employees except to say that this is what you now have, and this is what you would have if you were under the union agreement? The comparison was odious, so far as the Union was concerned, but it was perfectly truthful and did not contain any element of threat. It merely showed, as the Union's present agreement then read, that the employees were better off under the Company's wage schedule.

We suggest that the Board's finding that Robinson threatened the employees with a wage reduction if they joined the Union and came under the union contract is not supported by substantial evidence upon this record.

We respectfully call the Court's attention to its recent decision issued November 24, 1967 in *National Labor Relations Board v. TRW-Semiconductors, Inc.* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2707. In that decision this Court held that strong anti-union propaganda was permissible as free speech under Section 8(c) of the Act during a union's organizational campaign. The propaganda in that case involved predictions (1) that unionization would disrupt harmonious relations and would probably pro-

duce strikes with resulting wage loss and possible violence; (2) that labor troubles would aggravate the company's serious financial problems; (3) that present and future wages and benefits would be subject to collective bargaining, and (4) that unionization could subject the employees' job security to the whims of union leaders. The company mentioned rumors that people who didn't vote properly, i.e., in favor of the union, would find their tires slashed and would get roughed up or beaten up. If such strong and almost vicious propaganda is permissible as free speech by an employer during the union's organizational campaign, then certainly Robinson's much milder and extremely innocent remarks comparing the Company's present benefits with those prevailing under the appropriate union agreement must be equally protected as free speech under Section 8(c) of the Act.[6]

The Board has ruled to the same effect in *Belknap Hardware & Manufacturing Co.*, 157 NLRB No. 113, 61 LRRM 1541 (1966). There an employer's speech to employees (that went to far greater extremes than anything Robinson allegedly said), was held to be privileged. In *Belknap* the employer told the employees, among other things:

> (a) "The union cannot guarantee a job, steady work, a wage increase, or more benefits.

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[6]See also *NLRB v. Golub Corp.* (2nd Cir. 1967) ..... F.2d ....., 66 LRRM 2769, where the Court discussed the history of Section 8(c) of the Act and held that an employer prediction of more unfavorable relationships under a union contract was not a threat and did not violate the law.

'The only thing the Teamsters Union can really guarantee you is trouble and that they will be around on pay day to get their hands in your pockets and in your pay checks.' Unions cannot exist without trouble and without the money they collect from employees.

(b) "Not only will there be no automatic wage increases or other benefits if the Union wins the election, but just exactly the opposite is true.

(c) "Voting for a union does not automatically bring any increases or any benefits or any job security to you. If this Union were to win the election tomorrow there would still be only one way that it could try to force us to agree to any of its demands which we thought were unreasonable or which we otherwise couldn't see our way clear to agree to. That would be by pulling you out on strike.

(d) "The Union organizer says that if the Teamsters Union wins the election they will 'attempt to negotiate with Belknap the Teamsters pension plan.' If the Union organizer thinks for one moment Belknap would agree to seeing the pension plan we now have and to which we have already contributed several million dollars go down the drain, he is badly mistaken and even more stupid than we think he is."

The above is just a smattering from the employer's speech in *Belknap,* but it shows the general tones of the statements made. Yet the Board found the speech to be privileged under Section 8(c) of the Act and no grounds for setting aside an election. Compared

with *Belknap,* Robinson's remarks to the employees in this proceeding were innocent and angelic in comparison. Obviously, he committed no Section 8(a)(1) violation.

We request the Court to set aside the Board's determination that Robinson's speech violated Section 8(a)(1) of the Act.

II

THE BOARD ERRONEOUSLY DETERMINED THAT RESPONDENT VIOLATED SECTION 8(a)(5) OF THE ACT IN REFUSING TO BARGAIN WITH THE UNION.

Respondent recognizes the general rule established in this and other Circuits that an employer has no absolute right to demand an election. Where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, an employer, absent a good faith doubt of the union's majority, violates Section 8(a)(5) of the Act if he refuses to bargain with the union. *Snow v. NLRB* (9th Cir. 1962) 308 F. 2d 687; *NLRB v. Trimfit of California, Inc.* (9th Cir. 1954) 211 F. 2d 206; *Sakrete of Northern California, Inc. v. NLRB* (9th Cir. 1964) 332 F. 2d 902, cert. denied, 379 U.S. 961; *NLRB v. Kellogg's, Inc.* (9th Cir. 1965) 347 F. 2d 219; *NLRB v. Security Plating Company, Inc.* (9th Cir. 1966) 356 F. 2d 725; *Retail Clerks Union, Local 1179 v. NLRB (John P. Serpa, Inc.)* (9th Cir. 1967) 376 F. 2d 186; *NLRB v. Hyde* (9th Cir. 1964) 339 F. 2d 568; *NLRB v. Idaho Electric Co.* (9th Cir. 1967) 384

F. 2d 697, 66 LRRM 2393; *NLRB v. Luisi Truck Lines* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2461; *NLRB v. Mutual Industries, Inc.* (9th Cir. 1967) 382 F. 2d 988, 66 LRRM 2359; *Joy Silk Mills v. NLRB* (D.C. Cir. 1950) 185 F. 2d 732, cert. denied 341 U.S. 914.

In the instant case there is no question but that the Union had obtained signed membership applications from a majority of employees in the appropriate unit by the day it requested recognition. Recognition was requested on June 9, 1965. As the Board points out in its opening brief (page 2) between June 3 and June 8, 1965 the Union solicited and obtained membership applications from eight out of the twelve store employees.

However, just as the Employer does not have an unqualified right to insist upon an election before recognizing the Union, neither does the Union have an unqualified right to insist that the Employer recognize it and engage in collective bargaining upon the basis of having obtained membership applications from the employees. The Union's right is likewise subject to qualifications. *First,* it does not have a right to insist on recognition and bargaining based on authorization cards if the Employer has a good faith doubt that the Union represents a majority of the employees or that the membership or authorization cards truly reflect the views of the employees. *Second,* if the Union organizers obtain the membership applications or authorization cards from the employees by improper means, such as material misrepresentations,

the membership applications are tainted and invalid and cannot be used as a basis for requiring the Employer to recognize and bargain with the Union in the absence of an election. Both of these qualifications are present in the instant case.[7]

A. The Union Obtained the Membership Applications by Means of a Material Misrepresentation to the Employees, Thus Precluding the Use of the Applications As a Means to Compel the Employer to Recognize and Bargain With the Union in the Absence of an Election.

The record is clear that each employee was told that the membership applications would be kept secret in the union files and would never be shown to the Employer. In this connection there is also a strong implication in the record that the employees were told that the cards might be used to obtain an election or a cross-check by an impartial outsider. Turner, the Union organizer, testified that he did not recall exactly what he told the employees when signing them up, but he usually told them that they could have an election by the National Labor Relations Board or a cross-check of the cards by an impartial third party. (TR 53-57) He did not mention to them seeking a check of the cards directly by the Employer without a third party. (TR 57) He also testified that he told all employees substantially the same thing when signing them up, and told none of them anything materially different from the others.

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[7]Other circumstances, such as obtaining the membership cards or authorizations by means of coercion might also invalidate the cards as a basis for compelling the employer to recognize the union, but no such element as coercion was present in the instant case.

(TR 61) It is therefore a fair assumption from the record that all employees were given the same representations or misrepresentations by Turner and that what he said to one employee he said to all other employees.

Each employee still with the store at the time of the hearing testified, three as witnesses for the General Counsel and three as witnesses for Respondent. From Turner's testimony that he told all the employees the same thing, we can assume that what these six employees were told also applied to the other employees who were no longer with the store at the time of the hearing and who did not testify. These six employees were Huckaby, Cieri, Modrell, Janet Canfield, Billy Canfield, and Casler. Each testified that when asked to sign cards, Turner told them that the cards would be kept secret by the Union and would never be shown to the Employer. None testified differently. (TR 82, 83, 102, 147, 335, 340, 350, 354) Cieri also testified that Turner talked about an election when obtaining his membership application. (TR 102)

Turner did not deny this testimony. He was called before the employees so had not heard their evidence when he testified. However, he was available and could have been recalled. Furthermore, it is consistent with his testimony that he told employees about National Labor Relations Board elections and cross-checks by an impartial third party. Cards would be kept secret and never shown to the Employer under such circumstances. The employees' testimony rings true.

Also Mierly, the other union organizer, testified as a rebuttal witness of the General Counsel after all the employees had testified. He, too, failed to deny that the employees were told their cards would be kept secret and never shown to the Employer.

The statement that the cards would be kept secret and never shown to the Employer turned out, as mentioned previously, to be a misrepresentation because on June 9, the next day after the last cards were signed, the cards were shown to the store manager as part of the recognition demand.

The statement that the cards would be kept secret and would never be shown to the Employer was made in conjunction with an explanation by the union organizer to the employees that recognition might be obtained through a National Labor Relations Board election or through a card check by a neutral outsider. Under these circumstances, the cards are no longer all-purpose in nature, permitting the Union to obtain representation by any method it prefers. A commitment has been made by the Union to the employees that it will seek recognition by some method other than showing the Employer the cards. The Union should not be permitted to avoid such a commitment at its own free will. Otherwise it will benefit from its own chicanery and deceit, possibly at the expense of the employees. Recognition, based on a card check by the Employer, should not be required when the Union has promised the employees that their cards will not be shown to the Employer.

This does not deprive the employees of any rights. They may still want the Union or they may not. But this can be determined in one of the ways suggested by the Union to the employees when it promised their cards would be kept secret; either by a National Labor Relations Board election or by a card check conducted by a neutral outsider.

The Board suggests in its brief (pages 13 to 15) that Turner's misrepresentation to the employees should not invalidate the cards because it bore no relationship to the signer's actual intent—designation of the Union as his collective bargaining representative. The trouble with the Board's argument is that it is based upon pure hypothesis. We do not know for sure whether the employees would have signed the cards in the absence of Turner's misrepresentation. But we do know that it was an inducement made by the union organizer to the employees as part of his campaign to have the membership applications signed. And we can suspect that it was an important inducement. For we know that on June 9 and 10, eleven out of twelve employees told the Employer by secret ballot that they wished the question of Union representation determined by a secret ballot election and not by an Employer check of the cards. These ballots are in evidence as Resp. Exs. 5-5K. (TR 180-186, 220-222, 224, 226, 156-158) We know further that under date of June 14, 1965 nine employees of the Company signed a joint letter to union organizer Turner, asking immediate return of their application cards and demanding a secret ballot election.

(Resp. Ex. 2) Six of these had signed application cards. (G.C. Exs. 8-18) A copy of this letter was sent to the Company's president. (TR 293-294, 304) This letter was written by the employees only five days after the cards were shown to the Employer. Did the employees resent the misrepresentation and breach of faith over the use of the cards? They certainly had a secret ballot on their mind at all times.

Thus, we have not only the Union's misrepresentation that the cards would never be shown to the Employer, but, concurrently with the Union's demand for recognition, the employees' demand for a secret ballot election, plus five days later, their demand for a return of their cards from the Union. When all these facts are put together, it is clear that the cards are invalidated as a means of obtaining recognition from the Employer through his check of the cards. To rule otherwise would be a gross subversion of the expressed desires of the employees.

But we need not rely on a discussion of principle alone. The case of *Bauer Welding & Metal Fabricators, Inc. v. NLRB* (8th Cir. 1966) 358 F. 2d 766, 62 LRRM 2022, is almost directly in point. There the union sought authorization cards from the employees in a letter referring to the holding of a National Labor Relations Board election in terms which the Court found to be "both ambiguous and a skillful attempt at misrepresentation." The letter said (and the Court consistently italicized the words): "Your employer will never see these cards." The Court held

under these circumstances that a Section 8(a)(5) refusal to bargain violation could not be found where the Company refused to recognize the union based on cards alone. The Court reached its conclusion despite massive 8(a)(1) and 8(a)(2) violations on the part of the Company. These included forming and dominating an inside labor organization, threatening to discontinue existing benefits if the union came in, promising new benefits and instituting and sponsoring petitions to get the employees to repudiate the union. No such massive violations are present in the instant case.

With respect to the alleged refusal to bargain in the instant case, the situation is almost identical to that of *Bauer Welding*. In both cases the employees were told that their Employer would never see the cards. In *Bauer Welding* the Union made ambiguous written references to the holding of an NLRB election. In the instant case the union organizer made undefined oral references to the employees about holding an NLRB election, or having a cross-check by a neutral outsider. The principle of *Bauer Welding* should apply here. The cases cannot be distinguished on the refusal to bargain issue.

There are a substantial number of court decisions in various Circuits holding that material misrepresentations by a Union or its organizers to employees will invalidate the use of membership applications or authorization cards as a means of obtaining recognition and bargaining rights from the Employer. See *NLRB v. Freeport Marble & Tile Co., Inc.* (1st Cir.

1966) 367 F. 2d 371, 63 LRRM 2289; *S. E. Nichols Company v. NLRB* (2d Cir. 1967) 380 F. 2d 438, 65 LRRM 2655; *NLRB v. Golub Corp.* (2d Cir. 1967) ..... F. 2d ....., 66 LRRM 2769; *Crawford Manufacturing Co. v. NLRB* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2529; *NLRB v. Peterson Bros. Inc.* (5th Cir. 1965) 342 F. 2d 221, 58 LRRM 2570; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F. 2d 482, 64 LRRM 2849; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F. 2d 551, 64 LRRM 2823; *NLRB v. Winn-Dixie Stores, Inc.* (6th Cir. 1965) 341 F. 2d 750, 58 LRRM 2475, cert. denied 382 U.S. 830; *NLRB v. Swan Super Cleaners, Inc.* (6th Cir. 1967) 384 F. 2d 609, 66 LRRM 2385; *NLRB v. Koehler* (7th Cir. 1964) 328 F. 2d 770, 55 LRRM 2570; *NLRB v. Morris Novelty Company* (8th Cir. 1967) 378 F. 2d 1000, 65 LRRM 2577.

To allow the Board decision to stand, finding Respondent guilty of illegal refusal to bargain in violation of Section 8(a)(5) would not only subvert the expressed desires of the employees for a secret ballot election and endow the Union with the fruits of its misrepresentations, but would be contrary to the decision of the Eighth Circuit in *Bauer Welding* on the identical issue and would be contrary to decisions of the various Courts of Appeals cited above holding that a union may not obtain bargaining rights and recognition on the basis of authorization cards obtained through material misrepresentations. The decision of the Board on the Section 8(a)(5) issue should be set aside and denied enforcement.

B. When It Refused to Recognize and Bargain With the Union, Respondent Had a Good Faith Doubt As to the Union's Majority Status.

It is Respondent's position that when it refused to bargain with the Union it had a good faith doubt whether the cards represented the true wishes of the employees concerning the Union, and that this doubt was justified by the secret ballot filled out by the employees, and by the letter written by a majority of the employees to the Union requesting return of their cards and a secret ballot election.

(1) The Ballot.

Eleven out of twelve employees (one abstaining) told the Company by secret ballot that they wanted to show their desires regarding union representation by a secret ballot election and did not want the Company to recognize the Union on the basis of a card check without a secret ballot election. Respondent asserts that this constitutes a proper basis to doubt whether the cards represent the true feelings of the employees. The employees who signed the cards are in effect saying to the employer, maybe we want the Union and maybe we don't, but give us a chance to express our views in a secret ballot election, and we do not want you to recognize the Union on the basis of the cards alone. This does not prove that the employees want the Union, or that they do not want the Union. It creates a doubt as to the validity of the cards since the employees are telling the employer that they want an opportunity to express their views as to union representation in secret, and not by an

examination of cards. To disregard the views of the employees under such circumstances would undermine their ultimate freedom of choice.

The ballots were not taken under the safeguards which the NLRB would have imposed in a representation election. But this is not critical. No final status concerning representation or lack of representation by the Union was determined. The ballots merely established whether in good faith there was any reason to doubt the validity of the cards as true measure of the Union's representative status. The near unanimous desire of the employees for a secret ballot election, and not to have recognition of the Union on the basis of cards alone, showed that there was reasonable grounds to doubt the cards as a final and true measure of the employees' feelings concerning the Union.

The Trial Examiner asked at the hearing whether the ballot constituted an interference by the Employer. (TR 398) The answer is clearly "no". The complaint did not allege that the taking of the ballot was an unfair labor practice by the Employer. Furthermore, the Trial Examiner answered his own question and found that the balloting was objectively conducted and under the circumstances of this case was not an unfair labor practice. (Trial Examiner's Decision, page 9, lines 34-36. R 21) The Board did not reverse this finding of the Trial Examiner, pointing out that the complaint did not allege that the balloting or poll was an unfair labor practice by the Employer, and also finding that this issue had not been sufficiently

litigated to find any violation. (See Board's Decision, page 5, Footnote 3, R 42) Thus, it was neither alleged nor found by anyone that the taking of the ballots was an unfair labor practice by the Employer.

We suggest that under no circumstances could the taking of the ballots have been found to constitute an unfair labor practice by the Employer. *First,* neither the charge nor the complaint alleges the balloting to constitute a violation of the Act. The General Counsel introduced no evidence concerning the balloting. He obviously did not think it was a violation. The balloting was introduced into the case by respondent as part of its defense. *Second,* the ballot was conducted under noncoercive conditions. Not only were the mechanics of the voting completely noncoercive, but the written material on the ballots advised the employees that the ballots should not be signed, that the Company did not want to know how any particular individual voted, that the employees were not required to fill out the ballots if they did not so wish, and that there would be no recriminations no matter which way they voted. *Third,* it was not a ballot to determine the employees' views concerning the Union, but only their views concerning a secret ballot election or recognition by card check under the then circumstances. *Fourth,* Court authority suggests the right of an Employer to poll employees when faced with a card check request. In *NLRB v. Glasgow Co.* (7th Cir. 1966), 356 F.2d 476, 61 LRRM 2406, the Court sustained a refusal to bargain based on cards alone where the Court found the Employer had no good

faith doubt concerning the validity of the cards. One ground for the finding of no good faith doubt was that the Employer made no attempt to verify the Union's claim by inquiry to the employees. The Court stated:

> "Here there is no evidence of probative value to justify good faith doubt. In addition to its failure to reveal any reason for their 'belief' the record discloses no action upon the part of Glasgow, Leone, or any other representative of the Company, to attempt to verify the Union's claim through inquiry addressed to the Union *or to the employees.*" (Italics ours) 356 F.2d 476, 479.

In the instant case the ballots constituted a non-coercive inquiry to the employees, exactly what the Court suggested in *Glasgow*. And in *Glasgow* the poll was on the direct question of whether or not the employees wanted the Union. In the instant case, the question was more innocuous. The employees were not asked their views concerning the Union. They were only asked their views as to the method they preferred in determining the Union's majority status, or lack of it. The taking of such a ballot is not a violation of the Act.

In sum, the ballots alone were sufficient to justify the good faith doubt of the Employer as to the lack of validity of the cards as a true measure of the employees' feelings concerning the Union.

(2) The June 14, 1965 Letter of the Employees.

On June 14 a majority of the employees wrote the Union requesting the return of their cards, and de-

manding a secret ballot election. They sent a copy of their letter to the Company. (Resp. Ex. 1) If the ballots alone did not create a good faith doubt in the Company's mind as to the validity of the cards as a test of the employees' feelings concerning the Union, this letter was the clincher. It showed the Employer without question that a majority of the employees had grave doubts concerning the Union and perhaps repudiated it.

It is Respondent's position that either the ballots or the employees' letter alone would have been sufficient to create a good faith doubt as to the Union's majority status and the validity of the cards in demonstrating that alleged status. Together the ballots and the letter are unassailable in justifying and illustrating that doubt.

A copy of the letter was sent to Paul Kase, the Company's president in San Francisco, in an envelope postmarked June 21, together with a covering letter signed by an employee named Tingle. The covering letter referred to the fact that the enclosed letter to Turner was signed by a majority of the employees. Kase testified he received the letter on June 29 upon his return from a vacation trip. (TR 293-294, 304) There is no evidence in the record when the letter was mailed to Turner, but he testified he received the letter, did not return the employees' cards because he no longer had them, and he sent the letter along to his headquarters in Sacramento. (TR 63)

All employees who testified in this proceeding stated they signed the letter. (TR 89-91, 98-101, 136-138,

338-339, 350, 354-356) It was prepared by employees Casler and Tingle on June 14 and other employees thereafter signed it. (TR 355-357) It was not discussed with Finch. (TR 356)

The letter was a direct statement by the employees that they wanted their cards back. This was even stronger justification for the employer's good faith doubt than the ballots. It was a direct indication of employee dissatisfaction with the Union. The Courts and the Board have made it clear that when employees without coercion request the return of their cards, such cards can no longer be the basis for an 8(a)(5) violation. *TMT Trailer Ferry, Inc.*, 152 NLRB 1495, 59 LRRM 1353 (1965); *Reilly Tar & Chemical Corp. v. NLRB* (7th Cir. 1965) 352 F. 2d 913, 60 LRRM 2437; *Phelps Dodge Copper Products Corp. v. NLRB* (7th Cir. 1965) 354 F. 2d 591, 60 LRRM 2550.

(3) Events After June 9, 1965.

On June 9, 1965 Kessler, the Employer's attorney, wrote a letter to Kase, the Employer's president, concerning his telephone conversation the same day with Finch and Turner. He pointed out that he told Turner that Finch had no authority to sign anything and that Turner should get in touch with Kase within the near future, or vice versa. (Resp. Ex. 4) He also told Kase that the Union was claiming majority status as representative of the employees.

Finch testified to the best of his recollection that when he met with union organizers Turner and Mierly on June 9 they left no copies of General Coun-

sel's Exhibits 2, 3 and 4 with him. These were the letter requesting recognition, the recognition agreement, and the acknowledgment that the Union had signed up a majority of the Company's employees. At least he could never find any copies. (TR 205) Turner testified that he believed he left copies, but was sure he took the originals with him. This was true even of General Counsel's Exhibit 2, the letter addressed to the Company requesting recognition. (TR 43)

Kase testified that on June 14 he received copies of General Counsel's Exhibits 2, 3 and 4 in the mail, the last two being unsigned, and he thought he received them from the Union. He did not think he received them from Finch, or that Robinson delivered them to him along with the ballots on that day.[9] (TR 285-287, 298-301, 308-310)

On June 14 or 15, Kase employed Vetterlein, a labor relations consultant, to investigate the situation at Sonora, to contact the Union and generally handle the situation. He did not instruct Vetterlein to recognize the Union and engage in collective bargaining, or not to do so. (TR 292-296, 302-305) He sent Vetterlein copies of the material received in the mail on June 14 (G. C. Ex. 2, 3 and 4), copies of the ballots voted by the employees on June 9 and 10 (Resp. Ex. 5 through 5K), and a copy of the Memorandum written by Finch on June 12. (Union Ex. 1) (TR 319-322)

Kase was asked on cross-examination if he had any doubt on June 14 that the Union represented a

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[9]Kase received the ballots from Robinson on June 14, 1965. (TR 297-298)

majority of the employees at Sonora. He answered that he did have a doubt. (TR 305)

On June 15 Kase wrote Turner that the Sonora situation was being discussed with the company attorneys. (G. C. Ex. 5) This was true because Kessler testified he discussed the situation by telephone with Kase after the latter returned from Medford. Kase had been in Medford the week the events at Sonora occurred. (TR 117, 121)

Kase then went on vacation on Friday night, June 18, and did not return until Monday, June 29.

While he was away Alexander, the Union's Secretary-Treasurer, wrote him by letter dated June 21, 1965 suggesting a number of dates for a meeting. (G. C. Ex. 6) Kase found this on his desk when he returned from vacation on June 29, along with the letter from nine employees to Turner requesting their cards back and a secret ballot election. (Resp. Ex. 1) (TR 292-294) He sent copies of these to Vetterlein. (TR 322-323)

On July 7, Kase wrote Alexander and told him that Vetterlein had been appointed to represent the Company, and to feel free to contact him and discuss the situation. (G. C. Ex. 7) Vetterlein was sent a carbon copy of that letter. (TR 323)

Thereafter, Vetterlein testified he had a telephone conversation with Alexander which he placed on July 12. One purpose of the telephone conversation was to set up a series of negotiating meetings for Value World in Sacramento and Modesto, an Employer

pany would not bargain. On June 14 the Company had a good faith doubt because the employees on June 9 and 10 had overwhelmingly indicated by secret ballot that they wanted an election rather than a card check, and Kase received these ballots on June 14, the same day that he received the Union's demand for recognition, and by July 12 this doubt had been fortified because the Company had received the letter from the employees to the Union asking for the return of their membership applications and that a secret ballot election be held. Whenever the refusal to bargain can be held to have occurred, the Company had a clear good faith doubt, and a genuine one, on that date.

(4) The Store Manager's Authority.

The Board argues vigorously in its brief (pages 15-16) that Finch as store manager had authority to recognize the Union, and since he signed the recognition agreement and the acknowledgment of the Union's majority status in the meeting on June 9 (G. C. Exs. 3 and 4), the Employer is bound by his acts. But this argument omits one important factual aspect of the situation, which was that the union organizers were told on June 9 by the Company's attorney that Finch did not have authority to sign any documents on behalf of the Company. There was conflicting evidence on this problem, as we have discussed above in Respondent's Counterstatement of the Case. Finch and Kessler, the Company's attorney, testified that they told the union organizers that Finch did not have authority to sign anything. Turner, the union or-

ganizer, testified that he was only told that Finch could not sign a collective bargaining agreement, but he could sign a recognition agreement. The Trial Examiner resolved this conflict of testimony in favor of the Employer. He found that Finch questioned whether he *could* or should sign the document handed him by Turner. (Trial Examiner's Decision, page 5, lines 12-14, R 17) He further found that Attorney Kessler told Turner in his telephone conversation that Finch was not to sign anything, that the matter was to be taken up by officials of the Company in San Francisco and that Finch had no authority to recognize the Union. (Trial Examiner's Decision, page 5, lines 34-36; page 8, lines 33-38, R 17 and 20) These factual findings were not reversed by the Board. It is true that the Board found as a legal conclusion that Finch had ostensible authority to acknowledge the Union's majority status (Board Decision, page 4, R 41) This legal conclusion was clearly at variance with the factual findings of the Trial Examiner which the Board failed to reverse or disavow to the effect that the Union had been specifically told that Finch did not have authority to recognize the Union. We therefore urge that the execution by Finch of the recognition agreement and the acknowledgment of the Union's majority status (G. C. Exs. 3 and 4) is not a significant or critical factor to the resolution of the real issues in this case, to wit, whether the cards were invalidated by the Union's misrepresentations to the employees and whether the Employer had a good faith doubt of the Union's majority status when it declined to recognize and bargain with the Union.

(5) Trend in Other Circuits.

All Circuits which have ruled on the issue follow the principles laid down by *Joy Silk Mills* and *Snow, supra,* that where a union has obtained authorization cards signed by a majority of employees in an appropriate unit, the employer, absent a good faith doubt as to the union's majority, violates the National Labor Relations Act if he refuses to recognize and bargain with the union. This is the governing principle. However, as shown above, it does not give the union an unqualified right to obtain recognition based upon authorization cards. It may not obtain such recognition if the cards are invalidated by reason of having been obtained through material misrepresentation or coercion. Furthermore, as the statement of the rule indicates, the union does not have a right to recognition on the basis of its membership application cards if the employer has a good faith doubt that the union represents a majority of the employees in the appropriate unit.

In the application of this rule there are of course a considerable number of cases in other Circuits, as in this Circuit, where an Employer has been found guilty of an illegal refusal to bargain when he declines to recognize a union on the basis of its card showing and cannot demonstrate a good faith doubt that the union represents a majority of the employees. But in addition, particularly in more recent cases, we denote a discernible trend of the Courts to be extremely cautious in finding that an employer lacks a good faith doubt as to the union's majority

status and a reluctance to order bargaining on the basis of an authorization card showing in the absence of clear or almost overwhelming evidence that the union was the majority representative, that the cards truly reflected the view of the employees, and that the employer lacked a good faith doubt as to the union's majority status. Such decisions have occurred in the Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits. *NLRB v. Flomatic Corporation* (2d Cir. 1965) 347 F. 2d 74, 59 LRRM 2535; *NLRB v. S. E. Nichols Company* (2d Cir. 1967) 380 F. 2d 438, 65 LRRM 2655; *NLRB v. River Togs, Inc.* (2d Cir. 1967) 382 F. 2d 198, 65 LRRM 2987; *Textile Workers Union of America v. NLRB (Hercules Packing Corporation)* (2d Cir. 1967) ..... F. 2d ....., 66 LRRM 2751; *NLRB v. Heck's, Inc.* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2495; *Crawford Manufacturing Company, Inc. v. NLRB* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2529; *NLRB v. Logan Packing Company* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2596; *NLRB v. Great Atlantic & Pacific Tea Co.* (5th Cir. 1965) 346 F. 2d 936, 59 LRRM 2506; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F. 2d 482, 64 LRRM 2849; *Pizza Products Corporation v. NLRB* (6th Cir. 1966), 369 F. 2d 431, 63 LRRM 2529; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F. 2d 551, 64 LRRM 2823; *NLRB v. Swan Super Cleaners, Inc.* (6th Cir. 1967) 384 F. 2d 609, 66 LRRM 2385; *Phelps-Dodge Copper Products Corporation v. NLRB* (7th Cir. 1965) 354 F. 2d 591, 60 LRRM 2550;

NLRB v. Johnnie's Poultry Company (8th Cir. 1965) 344 F. 2d 617, 59 LRRM 2117; *NLRB v. Morris Novelty Co.* (8th Cir. 1967) 378 F. 2d 1000, 65 LRRM 2577; *Montgomery Ward & Co. v. NLRB* (8th Cir. 1967) ..... F. 2d ....., 66 LRRM 2689.

Some Circuits, namely, the Second, Fourth and Sixth, have stated that union authorization cards are generally or notoriously unreliable as an indicator of the union's majority status, and this is one of the reasons for their extreme caution in issuing bargaining orders based upon such cards. See: *NLRB v. River Togs, Inc.* (2d Cir. 1967) *supra; NLRB v. Logan Packing Company* (4th Cir. 1967) *supra; Pizza Products Corporation v. NLRB* (6th Cir. 1967) *supra; NLRB v. Flomatic Corporation* (2d Cir. 1965) *supra.* In *Logan Packing Company* the Court said:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks." ..... F. 2d ....., 66 LRRM 2596, 2598.

We do not suggest that this Circuit should forthwith overturn or reverse the principles it has established and enunciated ever since the decision in *Snow* in 1962. These principles have been upheld as recently as October 1967. *NLRB v. Luisi Truck Lines* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2461; *NLRB v. Idaho Electric Co.* (9th Cir. 1967) 384 F. 2d

697, 66 LRRM 2393; *NLRB v. Mutual Industries, Inc.* (9th Cir. 1967) 382 F. 2d 988, 66 LRRM 2359. What we do urge is that when a case like the instant one arises where the Union has misrepresented to the employees the use which will be made of the authorization cards, where concurrently with the Union's demand for recognition, the employees have overwhelmingly requested that the recognition issue be determined by secret ballot rather than by card check, and where within a few days thereafter the employees have requested return of their cards from the Union, the Court should differentiate this type of situation from cases previously decided in this Circuit and should decline to issue a bargaining order based upon cards alone. Such a determination would be consistent with the reluctance shown by other Circuits to issue a bargaining order based on cards alone unless the proof is clear or almost overwhelming that the cards represent the true wishes of the employees and that the employer completely lacks any good faith doubt as to the union's majority status. Here the proof is to the opposite. Because of the Union's misrepresentations it is extremely dubious that the cards represented the true wishes of the employees, at least we cannot tell in the absence of an election, and certainly by reason of the ballots and the employees' June 14 letter the Employer had a good faith doubt as to the Union's majority status when it declined to bargain with the Union.

(6) Robinson's Speech of June 12 Does Not Dispel Respondent's Good Faith Doubt.

As we have shown above, Robinson's talk to the employees on June 12, 1965 was protected as free speech under Section 8(c) of the Act and did not unlawfully threaten the employees with a reduction in wages if a union contract were executed. Not only did the complaint fail to allege any such violation, but the Board's conclusion is not supported by its own factual analysis of Robinson's speech. The Trial Examiner was correct in finding that there was no violation of Section 8(a)(1) of the Act by Robinson's talk. The Board erroneously extracted an illegal implication from his remarks.

But even if Robinson's speech were held to be a violation of Section 8(a)(1) of the Act, it was at most a minor and isolated violation. Obviously, Robinson was merely trying to compare the Employer's existing wage schedule with the wage schedule existing under the Union's discount store agreement and if he transgressed across the line and predicted that the employees would have a reduction in the amount of money they received if they were under the Union contract, it was at the most an innocent and unintentional violation, more through a misuse of words than an attempt to threaten the employees with an actual loss. The Union contract was not as favorable to the employees as was Respondent's wage schedule and Robinson was just trying to point out that fact.

The Trial Examiner did not think that Robinson's speech was unlawful in any respect. The Court of

Appeals for the Second Circuit has suggested that the Board's disagreement with its own Trial Examiner compels a conclusion that a flagrant violation of the Act is not present.

> "The Board's disagreement with its own Trial Examiner of the purport and effect of Rice's letter certainly compels the conclusion that we are not presented with a flagrant violation of the Act." *NLRB v. Flomatic Corporation* (2d Cir. 1965) 347 F. 2d 74, 78, 59 LRRM 2535, 2538.

Robinson's speech, whether or not an unfair labor practice, certainly does not dispel Respondent's good faith doubt that the Union represented a majority of its employees, which doubt was created by the ballots and the employees' desires to have their cards returned by the Union. Whether or not an employer has a good faith doubt of a Union's majority status must be determined upon the totality of the situation, not solely because the Employer may have committed an independent unfair labor practice, if such is the case. There are a substantial number of cases in which the courts have declined to order Employers to bargain on the basis of a Union showing of membership applications, even though the Employer may have committed other independent unfair labor practices, some of them quite serious in nature. The existence of other unfair labor practices having been committed by the Employer does not, in and of itself, dissipate his good faith doubt concerning the Union's majority status with respect to his employees. See: *NLRB v. Hannaford Bros., Inc.* (1st Cir. 1959) 261 F.2d 638,

43 LRRM 23; *NLRB v. River Togs, Inc.* (2d Cir. 1967) 382 F.2d 198, 65 LRRM 2987; *NLRB v. Heck's Inc.* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2495; *Crawford Manufacturing Company v. NLRB* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2529; *NLRB v. Logan Packing Company* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2596; *NLRB v. Dan River Mills* (5th Cir. 1960) 274 F.2d 381, 45 LRRM 2389; *NLRB v. Great Atlantic & Pacific Tea Company* (5th Cir. 1965) 346 F.2d 936, 59 LRRM 2506; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F.2d 551, 64 LRRM 2823; *Montgomery Ward & Co., Inc. v. NLRB* (6th Cir. 1967) 377 F.2d 452, 65 LRRM 2285; *Reilly Tar & Chemical Corporation v. NLRB* (7th Cir. 1965) 352 F.2d 913, 60 LRRM 2437.

In *River Togs, Inc. (supra)* the Employer had engaged in various violations of Section 8(a)(1) of the Act, including threats to close the plant rather than join a union, telling employees that anyone who wanted a union could leave the plant, threatening employees with job loss if the union came in, and telling employees that union activity would cause a removal of machines and loss of work from the plant. Nevertheless, the Court held that the employer had good reason to doubt the union's majority status in view of the general unreliability of authorization cards and his belief that the cards had been obtained by misrepresentation by the union and because of an anti-union petition being circulated by employees in the plant and the doubtful validity of three signatures on various cards. The Court said:

> "But apart from that we see no logical basis for the view that substantial evidence of good faith doubt is negated solely by an employer's desire to thwart unionization by proper or even by improper means." 382 F.2d 198, 206-207, 65 LRRM 2587, 2993.

In *Montgomery Ward (supra),* the Sixth Circuit said:

> "An employer may have a good faith doubt as to the union's majority even though the employer was found guilty of an unfair labor practice in connection with the union's organizational campaign." 377 F.2d 452, 459, 65 LRRM 2285, 2290-2291.

It is not the existence of other unfair labor practices but rather the record as a whole which indicates whether or not an employer has a good faith doubt as to the union's majority status. In the instant proceeding the Employer clearly had a good faith doubt by reason of the ballots in which the employees asked for an election and by reason of their letter requesting their cards back from the Union.

CONCLUSION

It is respectfully submitted that upon the record in this case the Court should conclude:

(1) That Respondent did not violate Section 8(a)(1) of the Act by reason of Robinson's talk to the employees on June 12, 1965;

(2) That Respondent did not engage in an unlawful refusal to bargain in violation of Sections 8(a)(5) and 8(a)(1) of the Act;

(3) That Respondent has committed no unfair labor practices whatsoever; and

(4) That the Decision and Order of the National Labor Relations Board in this matter should be denied enforcement in its entirety.

Dated, San Francisco, California,
January 15, 1968.

Respectfully submitted,
LITTLER, MENDELSON & FASTIFF,
By ARTHUR MENDELSON,
Attorneys for Respondent.

CERTIFICATE OF ATTORNEY

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR MENDELSON

(Appendices "A" and "B" Follow)

Appendices A and B

Appendix "A"

TABULATION OF EMPLOYEES IN UNIT JUNE 9, 1965, EMPLOYEES SIGNING CARDS, EMPLOYEES SIGNING LETTER OF JUNE 14, 1965 REQUESTING RETURN OF CARDS, AND EMPLOYEES STILL EMPLOYED AND TESTIFYING AT TIME OF HEARING.

Employees in Unit June 9, 1965	Signed Card	Signed Letter Asking Return of Cards	Still Employed and Testified at Hearing
Jean Modrell	yes (GC 8)	no	yes
Forrest Backert	yes (GC 15)	no	no
Jayne Casler	yes (GC 10)	yes	yes
Margaret Huckaby	yes (GC 18)	yes	yes
Ethel Lang	yes (GC 11)	yes	no
David Tingle	yes (GC 14)	yes	no
Richard Cieri	yes (GC 17)	yes	yes
Janet Canfield	yes (GC 13)	yes	yes
Billy Canfield	no	yes	yes
J. Pape	no	yes	no
Ron Nickol	no	yes	no
Employees No Longer in Unit June 9, 1965			
Michael Stone	yes (GC 16)		
Diane Labriola	yes (GC 12)		
Tom Modrell	yes (GC 9)		

Appendix "B"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) and of the Rules and Regulations of the National Labor Relations Board, Series 8, ... CFR ....., *et seq.*, are as follows:

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Free Speech

Sec. 8. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Prevention of Unfair Labor Practices

Sec. 10

* * * * *

(c) The Board shall have power to petition any court of appeals of the United States, or if all the

courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or

agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * *

Rules and Regulations of the National Labor Relations Board (29 CFR Part 102, Sec. 102.17):

Sec. 102.17 *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.